Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)))	WC Docket No. 07-52
Broadband Industry Practices	))	

COMMENTS OF EARTHLINK, INC. AND NEW EDGE NETWORK, INC.

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SUMMARY

As the Federal Communications Commission considers the future of the broadband marketplace, it has two fundamental courses it can take to protect consumer freedom and access to the Internet:

(1) Bolster *marketplace protection of Internet Neutrality* by promoting – at the very least, not discouraging – the competitive provision of broadband access; or

(2) Develop and enforce strict anti-discrimination measures regarding the conduct of broadband providers.

EarthLink focuses its comments on the former, and commends all parties to the Internet Neutrality debate to recognize the common ground where all can agree – marketplace protections of Internet Neutrality can efficiently and effectively protect the vibrant, open nature of the Internet.

EarthLink offers that the Commission can protect consumer freedom by promoting competition in the market for last-mile broadband access – and, so, concludes that the last policy choice for the Commission to make at this moment is to reduce competition by forbearing from its copper loop unbundling policies.

The last-mile broadband market is a highly concentrated ILEC and cable duopoly. Lack of choice has made the market vulnerable to anticompetitive conduct and threatens open access to the Internet.

In addition to their well-publicized plans to engage in discriminatory packet prioritization, the cable and telco duopoly has attempted to limit the ability of consumers to use applications of their choice. And these examples of bad conduct are just the tip of

the iceberg, demonstrating that these incumbent providers can and will block, impair, degrade and discriminate among Internet content and applications.

The availability of unbundled copper loops – and the ability of ISPs such as EarthLink to purchase UNE-based last-mile transmission from CLECs – not only improves services and decreases prices, but also checks the incumbent carriers' ability to engage in anticompetitive discriminatory conduct. Companies such as EarthLink and its partners, however, can only provide this check on anticompetitive discrimination if access to forward-looking cost-based copper loops remains available.

Unfortunately, Verizon has called for their elimination in portions of ten states from New Hampshire to North Carolina covering more than 35 million Americans, and Qwest has done so for an additional 12 million Americans. Without access to forward-looking cost-based copper UNE loops, and without real broadband competition, the Commission will have no alternative but to adopt regulations that intervene into the market to monitor and regulate broadband providers' conduct.

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EarthLink, Inc. ("EarthLink") and its Competitive Local Exchange Carrier ("CLEC") subsidiary, New Edge Network, Inc. ("New Edge"), hereby respond to the Commission's Notice of Inquiry ("NOI") in the matter of *Broadband Industry Practices*.[1]

INTRODUCTION

EarthLink helped to introduce America to the Internet by providing affordable Internet access and now supplies both basic and advanced broadband services. In response to the NOI, EarthLink urges the Commission, while it continues to review and monitor broadband industry practices, to leave in place the key statutory laws that currently enable the market to provide high speed broadband alternatives to the offerings of incumbent telephone company and cable company services. In particular, current policies enable competitors like EarthLink to provide UNE loop-based DSL services, without which the incumbent local exchange carriers ("ILECs") and cable companies are at best duopolists in both the lower and higher speed segments of the broadband market. Without UNE loop-based DSL services, duopoly pricing and other anticompetitive practices will continue to harm both residential and business consumers.

1 *Broadband Inquiry Practices*, Notice of Inquiry, FCC 07-31 (rel. April 16, 2007).

This proceeding arises because, as Commissioner Copps stated, "We live in a world where a very few concentrated broadband providers exercise powerful and not always consumer-friendly control over the pipes that come into our homes and business."[2] FCC statistics show that the incumbent telco and cable company together control over 93% of last-mile broadband access. For services above 2.5 Mbps (higher speed broadband), their market share is even higher. Moreover, even a cursory examination of the prices being charged in the marketplace in comparison with the speeds provided shows that wireless broadband (with the exception of a few municipal WiFi services) is in a separate market from affordable basic broadband and the higher speed broadband services that the incumbent telcos and cable companies can provide.

Today's broadband duopoly is effectively leveraging its market power into other adjacent markets. In addition to the well-publicized plans to engage in invidious packet prioritization based on either an affiliation with the service provider or a pay-to-prioritize plan, cable and telco have attempted to limit the ability of consumers to use applications of their choice. Contractual terms that effectively restrict a consumer's use of competitive VoIP services or that enable the broadband last-mile owner to restrict unilaterally otherwise legal peer-to-peer or high bandwidth applications illustrate the harm that concentration in the broadband access market can have on the Internet.

Commissioner McDowell has cautioned that while the Commission "must remain vigilant against possible market failure or anti-competitive conduct that would hamper the full development of the Internet and related services being provided to consumers," it

2 *Id.*, Statement of Commissioner Copps.

must also "resist the temptation to impose regulations that are based merely on theory"[3] – which is always a particular challenge when addressing conduct regulation because the other danger is closing the barn door only after the horse has escaped.

Fortunately, the Commission has a tool other than service regulation in its toolbox – a structural remedy to discipline the incumbent last-mile access providers' market power and to promote both broadband investment and affordable alternative broadband services: competition. Effective last-mile broadband competition will not only achieve the public interest goal of providing a third or fourth alternative to consumers, but it will also provide marketplace protection of Internet neutrality – price and service discipline to address the likely harms of excessive concentration including anticompetitive pricing practices, service restrictions, and access limitations. Commission policies that promote competitive broadband entry, such as unlicensed spectrum, use of the television "white spaces," and the recent permissive licensing regime established in the 3650-3700 band all seek to provide streamlined entry for competitive broadband access providers. As Commissioner McDowell explained in the recent 700 MHz proceeding: "The more players we have competing both between and within platforms, the better. Such competition will also spur untold economic growth."[4]

The most effective means of providing competitive broadband access and marketplace protection of Internet neutrality, however, remains the Commission's copper loop unbundling policies. Despite persistent regulatory uncertainty since the passage of the 1996 Telecommunications Act, CLECs and others have invested in facilities and

3 *Id.*, Statement of Commissioner McDowell.

4 *See Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, Report and Order and Further Notice of Proposed Rulemaking, Statement of Commissioner McDowell, FCC 07-72, WT Docket No. 06-150 et.al. (rel. April 27, 2007).

brought competitive services, including high speed broadband services, to millions of consumers. Today, with substantial regulatory stability for UNE loops finally achieved, there is a genuine opportunity for competitors to bring consumers real competitive options. In markets around the country, companies such as EarthLink, Covad, Cavalier, Broadview and others obtain UNE copper loops (directly or though a CLEC partner), attach their own DSLAMs, switches/routers, backhaul and backbone connections, and provide advanced broadband services that are, for all relevant purposes, fully independent of the telephone company over whose copper loops the service is provided. These independent broadband providers thus create, structure, and dimension their broadband services independently of the ILEC's choices. EarthLink, for example, offers a truly differentiated voice product that provides up to 8 Mbps broadband service over ILEC copper loops and line powered voice service in areas where the ILEC has no comparable service.

Maintaining forward-looking cost-based access to copper UNE loops – which requires only that the Commission not further forbear – ensures that wherever these loops exist, multiple competitive broadband providers can provide independent alternatives to the ILEC and the cable company. The availability of copper UNE loops provides a market-based mechanism to address the potential for consumer-unfriendly or anticompetitive action that would otherwise occur in an unchecked duopoly and monopoly marketplace. So long as forward-looking cost-based copper UNE loops are available, the market can provide alternatives to anticompetitive or consumer-unfriendly behavior by the largest providers.

If, however, the Commission were to forbear from forward-looking cost-based copper UNE loop unbundling, as Verizon has sought for portions of ten states from New Hampshire to North Carolina covering over 35 million Americans, and Qwest has sought in four MSAs covering almost 12 million Americans, the Commission will weaken marketplace protection of Internet neutrality, abandon the structural safeguards necessary to prevent consumer-unfriendly and anticompetitive actions in these broadband markets, and will likely have to implement a panoply of service and conduct regulation to preserve the openness and diversity of the Internet and prevent market failure.

I. NET NEUTRALITY CONCERNS ARE REAL AND ARISE FROM HIGH CONCENTRATION FOR LAST-MILE BROADBAND ACCESS.

A. The Lack Of Last-Mile Broadband Access Alternatives Increases The Likelihood Of Market Failure And Anticompetitive Conduct.

The high concentration in the market for last-mile broadband access is indicative of a market failure, making it more likely that the incumbent providers can, in parallel, impose anticompetitive pricing and block, impair, degrade or discriminate among competitive services, Internet content, and applications in ways that place their commercial interests above consumer interests. There is little doubt that the last-mile broadband market is currently a highly concentrated ILEC and cable duopoly, at best. Indeed, because of cable companies' traditional focus on residential consumers, the ILECs frequently have a monopoly over broadband access serving enterprise customers. More specifically, the FCC's own statistics reflect that over 93 percent of *all* broadband is provided by a cable company or an incumbent telephone company.[5] The extent of

[5] *See* Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, *High-speed Services for Internet Access: Status*

concentration is even more striking in the market for higher-speed broadband. For speeds of above 2.5 Mbps in the faster direction, 99.93 percent of services are provided over DSL, fiber, or cable.[6]

As EarthLink has explained to the Commission in its opposition to Verizon's forbearance petition,[7] UNE-loop based broadband service, like that provided by EarthLink in partnership with CLECs, provides consumers with an independent alternative that disciplines the duopolists and that gives consumers the benefits of a truly competitive market: lower prices, greater innovation and increased service choices. Other technologies – such as CMRS, satellite, and broadband over powerlines ("BPL") – are promising avenues for the future, but not yet real alternatives to facilities-based wireline broadband. BPL is a nascent technology, which according to the FCC's own statistics, serves just a minute percentage: 5,208 broadband lines (out of 64 million) nationwide.[8] Wireless broadband is more widely available, but prices for wireless services are significantly higher and speeds are considerably slower than the broadband provided by DSL, fiber or cable modem.[9] Nor is resale an adequate alternative to the

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as of June 30, 2006, Table 6 (January 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-270128A1.pdf ("*High-speed Services for Internet Access*").

6 *High-speed Services for Internet Access*, Table 5.

7 *Opposition of EarthLink, Inc. and New Edge Network, Inc. to the Petitions of Verizon Telephone Companies for Forbearance*, WC Docket No. 06-172, at 12-27 (March 5, 2007) (discussing, in depth, the broadband markets and market participants) ("*EarthLink Opposition to Verizon Forbearance*").

8 *High-speed Services for Internet Access*, Table 6.

9 As EarthLink has explained, wireless offerings average around $60 per month for download speeds of 400-700 kbps, compared with $19.95 per month for Verizon's lowest speed broadband service. *See EarthLink Opposition to Verizon Forbearance* at 21-22.

ILEC or cable company because, as discussed further below, resellers must live within limits largely dictated to them by the incumbent LECs or cable companies.[10]

B. Net Neutrality Concerns Are Real And Cannot Be Ignored By The Commission.

The lack of competitive alternatives for last-mile broadband access allows the incumbents that control such access to engage in anticompetitive conduct that threatens to undermine the consumer benefits of broadband. The intentions of the broadband mega-players to engage in discriminatory packet prioritization have been well publicized.[11] Whether the mechanism is service-provider affiliation or pay-to-prioritize plans, the result is the same: such practices limit the freedom of consumers to use the applications of their choice.

In addition, as EarthLink has previously told the Commission,[12] the ILECs have already sought to impose contractual restrictions in wholesale agreements that ultimately impair consumers' rights to access content and run applications of their choice.

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[10] *EarthLink Opposition to Verizon Forbearance* at 7-8, 13-14.

[11] *See "At SBC, It's All About 'Scale and Scope,'"* Business Week, *available at: http://www.businessweek.com/@@n34h*IUQu7KtOwgA/magazine/content/05_45/b3958092.htm* (Nov. 7, 2005) (stating that applications providers like Google should have to "pay for the portion" of the pipes they are using); Barnako, F., "*BellSouth wants new Net fees*," Market Watch, Internet Daily (Jan. 16, 2006), *available at: http://www.marketwatch.com/News/Story/Story.aspx?guid=%7B02432D2D%2D1EE0%2D4037%2DA15F%2D54B748D6CF26%7D&siteid=mktw&dist* (reporting BellSouth's intent to levy charges on content providers to reliably and speedily deliver content and services of the providers).

[12] *See Notice of Ex Parte Presentation- WC Dkt. 06-74, In the Matter of Application for Consent to Transfer of Control Filed by AT&T and BellSouth Corporation,* WC Docket No. 06-74, attachment at 2 (filed Oct. 4, 2006) ("*Ex Parte Presentation of EarthLink, Inc.*"); *Ex Parte Presentation of EarthLink, Inc*., WC Docket No. 06-74 (filed Oct. 5, 2006); *Ex Parte Presentation of EarthLink, Inc.*, WC Docket No. 06-74 (filed Oct. 4, 2006); *Ex Parte Presentation of EarthLink, Inc.*, WC Docket No. 06-74 (filed Sept. 28, 2006).

EarthLink has provided significant evidence of ILEC conduct that violates the Commission's existing Internet neutrality principles.[13] For example, the former BellSouth Corporation sought to require EarthLink to give the ILEC complete discretion to bar otherwise legal "file sharing, peer to peer traffic, and video streaming" if it unilaterally decided they constituted "excessive bandwidth" – a term that the contract did not define.[14] BellSouth's current contracts with New Edge also restrict legitimate end user activity, commanding that "End user products that use or incorporate the Service must be sold, supported, and billed by New Edge Networks."[15] This language could restrict end-users from downloading a song from ITunes, or using TurboTax to electronically file their taxes. Even more problematic, as a prerequisite for wholesale broadband negotiations, BellSouth sought a requirement that New Edge would not offer VoIP services, plainly undermining consumers' rights to access content, run applications, and use services of their choice on the Internet.

EarthLink's experience is surely just the tip of the iceberg, underscoring not only that have gross violations of the Commission's Internet neutrality principles occurred, but also, without last-mile UNE-loop alternatives, that the ILEC and cable companies possess both the ability and the incentive to continue to impose anticompetitive and discriminatory requirements against consumers and competitors.

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[13] *See id.; EarthLink Opposition to Verizon Forbearance* at 7-8.

[14] *Ex Parte Presentation of EarthLink, Inc. at 3.*

[15] *Id.* at 4.

II. THE COMMISSION CAN ADDRESS NET NEUTRALITY CONCERNS BY PRESERVING AND PROMOTING COMPETITION IN THE BROADBAND MARKETS.

Conceptually, there are two ways for the Commission to address the existing and prospective Internet neutrality concerns that arise from the highly concentrated market for broadband access. *First*, the Commission can bolster marketplace protection of Internet Neutrality by promoting the competitive provision of broadband access. As EarthLink explained in its opposition to Verizon's petitions for forbearance, competition in the broadband access market not only increases choices, improves services, and decreases prices – but also checks the incumbent carriers' ability to block, degrade, or unreasonably discriminate against Internet content and applications.[16] *Second*, absent real broadband competition, the Commission will have no alternative but to adopt a panoply of strictly enforced non-discrimination regulations on broadband providers. The choice, EarthLink submits, is clear – encouraging broadband competition is the most effective thing the Commission can do to protect consumers' open access to Internet content, applications, and devices.

A. Preserving The Commission's Copper Loop Unbundling Policies Is Key To Ensuring The Competitive Broadband Access Necessary To Promote America's Lead In A Consumer-Friendly Broadband Internet.

The best thing the Commission can do to safeguard consumers' open access to the Internet, without *ex ante* regulatory intervention, is to promote competition in the last-mile broadband market by preserving its copper loop unbundling policies. Maintaining forward-looking cost-based access to copper UNE loops allows competitive broadband providers, like EarthLink, to create, structure, and dimension broadband services,

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[16] *See EarthLink Opposition to Verizon Forbearance* at 38-39.

independent of the ILEC's choices. EarthLink, for example, partners with CLECs to offer a DSL and VoIP service that not only provides effective price and service competition to the ILECs and cable but offers a truly differentiated voice product. Based on a widespread deployment of advanced ADSL2+ DSLAMs, this service provides up to 8 Mbps broadband service over ILEC copper loops and a line powered voice service in areas where the ILEC does not provide comparable service. The current unbundling regime, therefore, is already an established, successful way to open up the broadband market. The Commission – simply by declining to forbear further from this regime – can promote the competition needed for marketplace protection of Internet neutrality.

As EarthLink explained in its opposition to the Verizon forbearance petitions, in the current marketplace, the availability of unbundled copper loops – and the ability of ISPs like EarthLink to purchase UNE-based last-mile transmission from CLECs – constrains ILECs and cable companies engaging in anticompetitive conduct.[17] If an incumbent provider, for example, were to prefer Google over Yahoo!, an ISP purchasing UNE loop-based DSL transmission from a CLEC could use its equipment to provide an Internet access service that treats Yahoo! and Google comparably in last mile transmission. The same would be true if an ILEC or a cable operator were to block streaming video that competed with one of their affiliated video products. An ISP could partner with a CLEC and provide unrestricted access to all streaming video over a UNE-L based platform. Thus, where competition in the last-mile provision of broadband access is adequate, the market – rather than government regulatory intervention – can,

[17] *Id.*

and will, safeguard consumers' ability to use the Internet whenever and however they want.

Without UNE-based competition, ILECs and the cable company could more easily leverage their control over last mile facilities to block competitors' devices, impair the transmission of competitors' services or discriminate against unaffiliated content and application providers. UNE-based broadband Internet access can thus function as an effective third pipe to home and business, protecting against such strategic behavior.

Companies such as EarthLink and its CLEC partners, however, can only provide this check on anticompetitive discrimination if forward-looking cost-based access to copper UNE loops remains available. For CLECs, the eleven years since the 1996 Act have been plagued by regulatory instability in the availability of UNE loops. Despite the persistent uncertainty as to the governing regulatory regime, however, CLECs nevertheless invested in facilities and brought competitive broadband access to millions of homes and businesses. Today, there is finally some regulatory stability in this market, and CLECs are taking advantage of it – relying on unbundled copper loops to provide the only competitive alternative to the ILEC and cable duopoly capable of checking anticompetitive restrictions on the Internet. The last thing the Commission should do is upset the apple cart, plunging UNE-based providers back into uncertainty. In the end, regulatory instability only undermines consumers' choices for access to the Internet by making it difficult for competitors to invest in the kinds of services that provide alternatives to ILEC and cable company offerings.

The Commission has recently taken a number of actions consistent with promoting entry, and thus increasing competition, in the broadband market, including the availability of 700 MHz spectrum,[18] the creation of a permissive licensing regime in the 3650 – 3700 band,[19] and the white spaces proceeding.[20] But none of these policies yet can do what the Commission's copper loop unbundling policies are already doing – produce market-disciplining competitors that can check anticompetitive discriminatory conduct on the Internet.

B. Absent Adequate Broadband Competition, The Commission Will Have No Alternative But To Adopt And Strictly Enforce Ex Ante Broadband Regulations To Ensure Net Neutrality Is Preserved.

If the Commission were to forbear from copper loop unbundling regulations, competitive offerings from companies like EarthLink – a key structural check on the broadband duopolist's anticompetitive and discriminatory practices – will be eliminated.[21] Without this structural remedy, the high concentration in broadband market provides both the incentive and ability for ILECs and cable companies to block, impair, degrade or discriminate among Internet content and applications. The Commission will only be left with one alternative – direct market interventions to monitor and regulate broadband providers' conduct.

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18 *See Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, Report and Order and Further Notice of Proposed Rulemaking, FCC 07-72, WT Docket No. 06-150 et.al. (rel. April 27, 2007).

19 *See Wireless Operations in the 3650-3700 MHz Band; Rules for Wireless Broadband Services in the 3650-3700 MHz Band; Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band*, Memorandum Opinion and Order, FCC 07-99, ET Docket No. 04-151; WT Docket No. 05-96; ET Docket No. 02-380, at ¶ 1 (rel. June 7, 2007) (affirming the Commission's decisions to "create a spectrum environment that will encourage multiple entrants and stimulate the expansion of broadband service to rural and under served areas").

20 *Unlicensed Operation in the TV Broadcast Bands; Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band*, First Report and Order and Further Notice of Proposed Rule Making, 21 FCC Rcd. 12266 (2006).

21 *See EarthLink Opposition to Verizon Forbearance* at 26-38.

CONCLUSION

For the reasons above, EarthLink urges the Commission to safeguard consumers' unfettered access to Internet content and applications by declining to forbear further from its copper loop unbundling laws and policies and, thereby, promoting the competitive provision of last-mile broadband access and marketplace protections for Internet neutrality.

Respectfully Submitted,

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